MUNIANDY A/L THAMBA KAUNDAN & ANOR.

v.

DEVELOPMENT & COMMERCIAL BANK BERHAD & ANOR.

FEDERAL COURT, PENANG
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN ABDULLAH FCJ
DATO' ABU MANSOR ALI JCA
[CIVIL APPEAL NO. 02-153-94]
9 FEBRUARY 1996

CIVIL PROCEDURE: *Judgment - Charges - Judge granting ex-parte orders for sale of land - Chargors not served with notice of adjourned hearing of originating summons - Effect - Whether ex-parte orders null and void - Whether liable to be set aside - Whether there was breach of natural justice - Order 83 r. 2(4) Rules of High Court - Maxim of audi alteram partem - Lapse of time - Whether could bar an application to set aside a null judgment - Waiver - Judgment a nulity - Whether could be waived - Rules of the High Court O. 83 r. 2(4).*

LAND LAW: *Charges - Application under s. 256(2) National Land Code - Absence of chargors - Ex-parte orders by Court for sale of land - Chargors not served with notice of hearing of originating summons - Whether orders null and void - Whether in breach of O. 83 r. 2(4) Rules of High Court 1980 - Audi alteram partem - Whether applicable - Whether orders to be set aside - National Land Code ss. 25(2)(3), 340(2)(b).*

On 8 March 1991, pursuant to s. 256(2) National Land Code, the chargees herein commenced proceedings in the High Court to enforce the charge which the chargors had created in their favour. The chargors did not enter appearance, but attended Court on 30 October 1991 when the originating summons was supposed to be heard. The case however was not heard on that date, and the summons was refixed for hearing on 29 January 1992, whereupon the case was heard *ex-parte*, and orders in terms of the originating summons, including the order for sale, were made.

The chargors filed a summons in chambers and by that sought to set aside the *ex-parte* orders. The facts showed that neither of the chargors were served with notice of the adjourned hearing of 29 January 1992, when the *ex-parte* orders were made. Before the learned Judge, the chargors argued that the non-service of notice had resulted in a breach of natural justice contrary to O. 83 r. 2(4) Rules of the High Court 1980 (RHC), by reason which the *ex-parte* orders were rendered null and void. Counsel for the chargees contended that the High Court was already *functus officio* as the orders had been perfected before the chargors' summons in chambers to set aside had been filed. It was also contended that it was a requirement of O. 83 r. 2(4) that

the chargees' claim should relate to possession or payment of moneys secured by a charge, and that since the relief prayed for herein did not include such relief, O. 83 r. 2(4) therefore did not apply. These apart, it was further submitted that the failure to serve the notice only rendered the *ex-parte* orders irregular, which irregularity, in the circumstances, had been cured by waiver on the part of the chargors. It was not in dispute that after the judicial sale of the land, the chargors had collected the balance of the proceeds of sale after deduction of the moneys payable under the charge.

The learned Judge adopted the chargees' submission and accordingly gave judgment in their favour. The chargors hence appealed and before the Supreme Court the main issues that arose were:

(1) whether the chargees' failure to serve the chargors with notice of the adjourned hearing of the originating summons had rendered the *ex-parte* orders null and void, and if so, whether it was open for the learned trial Judge to apply the principle of *functus officio* to the circumstances of the case.

(2) In any case, whether the *ex-parte* orders were liable to be set aside by the application of the maxim of *audi alteram partem*, vide O. 83 r.2(4) RHC, as well as the Court's inherent jurisdiction.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The principle of *functus officio* is subject to certain exceptions one of which is that an order which is a nullity owing to failure to comply with an essential provision such as service of process, can be set aside by the Court which made the order in the exercise of its inherent jurisdiction. It follows that if the *ex-parte* orders here were null and void, then the Judge was wrong in applying the principle of *functus officio* to the circumstances of the case.

[2] The failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance that it must render each of the *ex-parte* orders obtained a nullity. The defect is so fundamental as to entitle the chargors to have the judgment avoided and set aside as of right.

[3] Order 83 has a common law content which means that the Order is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the maxim *audi alteram partem,* so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. In any case, it is a familiar canon of interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem.*

[4] On the facts, the chargees were wrong in their description of the reliefs that they had prayed for in their originating summons. However, assuming that they were right, i.e, that they were not in fact claiming possession or payment of moneys secured by a charge or both, that alone would not have relieved the chargees of their duty to serve notice of the adjourned hearing of the originating summons on the chargors having regard to the applicability of the maxim *audi alteram partem* and hence O. 83 r. 2(4).

[5] Lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. Further, under its inherent jurisdiction to prevent an abuse of its proceedings, the Court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances require the intervention of the Court.

[6] There can be no waiver in the absence of an intention to waive. The chargors here were laypersons and unrepresented and obviously knew nothing about their legal rights. In these circumstances, the chargors' acceptance of the money could not be construed as an intention to waive those rights. In any event, an order which is a nullity is incapable of being waived. The chargors' summons in chambers, therefore, was not barred by waiver.

[Appeal allowed. Judgment of Court below set aside]

***[Bahasa Malaysia** Translation Of Headnotes]*

***PROSEDUR SIVIL:** Penghakiman - Gadaian - Hakim memberikan perintah ex-parte bagi penjualan tanah - Penggadai tidak disampaikan dengan notis penangguhan perbicaraan sama pemula - Kesan - Samada perintah ex-parte batal dan tak sah - Samada boleh diketepikan - Samada terdapatnya kemungkiran keadilan semulajadi - Aturan 83 Kaedah 2(4) Kaedah-Kaedah Mahkamah Tinggi - Maxim audi alteram partem - Keluputan masa - Samada boleh menghalang suatu permohonan untuk mengenepikan penghakiman yang terbatal - Pelepasan - Penghakiman suatu pembatalan - Samada boleh diberi pelepasan - Kaedah-kaedah Mahkamah Tinggi A. 83 k. 2(4).*

***UNDANG-UNDANG TANAH:** Gadaian - Permohonan di bawah s. 256(2) Kanun Tanah Negara - Ketidakhadiran penggadai - Perintah ex-parte oleh Mahkamah bagi penjualan tanah - Penggadai tidak disampaikan dengan notis mengenai saman pemula - Samada perintah batal dan tak sah - Samada dalam kemungkiran A. 83 Kaedah 2(4) Kaedah-kaedah Mahkamah Tinggi 1980 - Audi alteram partem - Samada boleh dipakai - Samada perintah-perintah haruslah diketepikan - Kanun Tanah Negara ss. 25(2)(3), 340(2)(b).*

Pada 8 Mac 1991, selaras dengan s. 256(2) Kanun Tanah Negara, pemegang-pemegang gadaian telah memulakan prosiding di Mahkamah Tinggi bagi menguatkuasakan gadaian yang telah diwujudkan oleh penggadai atas nama mereka. Penggadai-penggadai tidak memasukkan kehadiran, tetapi telah menghadiri Mahkamah pada 30 Oktober 1991 bilamana saman pemula tersebut sepatutnya didengar. Kes tersebut walaubagaimanapun telah tidak didengar pada tarikh itu, dan saman tersebut telah ditetapkan semula pada 29 Januari 1992, di mana kes tersebut telah didengar secara *ex-parte*, dan perintah sepertimana yang dipohon oleh saman pemula tersebut, termasuk perintah untuk jualan, telah dibuat.

Penggadai-penggadai telah memfailkan saman dalam kamar dan melaluinya berusaha untuk mengenepikan perintah-perintah *ex-parte* tersebut. Fakta menunjukkan bahawa penggadai-penggadai telah tidak disampaikan dengan notis perbicaraan bertarikh 29 Januari 1992 yang ditangguhkan itu, bilamana perintah-perintah *ex-parte* tersebut dibuat. Di hadapan Hakim yang bijaksana, penggadai-penggadai berhujah bahawa penyampaian notis yang tidak dilakukan itu telah mengakibatkan kemungkiran keadilan semulajadi yang bertentangan dengan A. 83 k. 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 (RHC), dan atas alasan yang sedemikian perintah-perintah *ex-parte* tersebut menjadi batal dan tak sah. Peguam bagi pihak pemegang gadaian menegaskan bahawa Mahkamah Tinggi telah pun *functus officio* kerana perintah-perintah tersebut telah disempurnakan sebelum saman dalam kamar penggadai-penggadai untuk mengenepikan telah difailkan. Telah juga ditegaskan bahawa ianya merupakan kehendak A. 83 k. 2(4) bahawa tuntutan penggadai-penggadai seharusnya mempunyai kaitan kepada pemilikan atau pembayaran wang yang dijamin oleh satu gadaian, dan bahawa oleh kerana relief yang dipohon di sini tidak memasukkan relief yang sedemikian, A. 83 k. 2(4) dengan itu tidak terpakai. Selain itu, ianya telah seterusnya dihujahkan bahawa kegagalan untuk menyampaikan notis tersebut hanya menjadikan perintah-perintah *ex-parte* itu di luar aturan, luar aturan yang mana, dalam keadaan tersebut, telah diperbaiki oleh pelepasan (waiver) dipihak penggadai-penggadai. Ianya tidak dipertikaikan bahawa selepas penjualan kehakiman tanah tersebut, penggadai-penggadai telah mengambil baki hasil jualan selepas menolak wang yang kena dibayar di bawah gadaian tersebut.

Hakim yang bijaksana telah menerima-pakai hujahan pemegang gadaian dan berikutan itu memberikan penghakiman yang memihak kepada mereka. Penggadai-penggadai dengan itu merayu dan di hadapan Mahkamah Agung isu utama yang berbangkit adalah:-

(1) sama ada kegagalan pemegang gadaian untuk menyampaikan notis ke atas penggadai-penggadai mengenai penangguhan perbicaraan saman pemula telah menjadikan perintah-perintah *ex-parte* tersebut batal dan tak sah, dan jika sedemikian, samada ianya terbuka bagi Hakim perbicaraan yang bijaksana untuk memakai prinsip *functus officio* kepada hal keadaan kes disini.

(2) Walau apapun, samada perintah-perintah *ex-parte* tersebut boleh diketepikan oleh pemakaian maxim *audi alteram partem* melalui A. 83 k. 2(4) Kaedah-kaedah Mahkamah Tinggi dan juga melalui bidangkuasa sedia ada Mahkamah.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Prinsip *functus officio* adalah tertakluk kepada pengecualian-pengecualian yang tertentu dan salah satu daripadanya adalah bahawa sesuatu perintah yang terbatal disebabkan kegagalan untuk mematuhi peruntukan penting seperti penyampaian saman, boleh diketepikan oleh Mahkamah yang membuat perintah tersebut dalam melaksanakan bidangkuasa sedia adanya. Ianya mengikut bahawa jika perintah-perintah *ex-parte* di sini adalah batal dan tak sah, maka Hakim adalah salah dalam memakai prinsip *functus offico* kepada hal keadaan kes disini.

[2] Kegagalan di pihak pemegang-pemegang gadaian untuk memberitahu penggadai-penggadai mengenai tarikh perbicaraan yang telah ditangguhkan itu adalah amat penting sehinggakan ianya mestilah menyebabkan setiap perintah *ex-parte* yang diperolehi itu menjadi taksah dan batal. Ketidak-sempurnaan tersebut adalah amat fundamental memberi hak kepada penggadai-penggadai untuk mengelak penghakiman tersebut dan mengenepikannya sebagai suatu hak.

[3] Aturan 83 mempunyai kandungan common law yang mana bermaksud bahawa Aturan tersebut adalah semata-mata suatu pengumuman berkanun mengenai kaedah penting keadilan semulajadi sepertimana yang dinyatakan dalam maxim *audi alteram partem,* dan dengan itu kewajipan untuk menyampaikan notis mengenai perbicaraan saman pemula tersebut yang telah ditangguhkan itu kekal walaupun jika A. 83 k. 2(4) tidak terpakai. Dalam apa keadaan pun, ianya merupakan aturan biasa pentafsiran bahawa kecuali terdapat suatu niat yang bertentangan sesuatu enakmen melalui implikasi memberi maksud pemakaian prinsip maxim *audi alteram partem.*

[4] Berdasarkan fakta pemegang gadaian adalah salah tentang penjelasan mereka mengenai relief-relief yang telah mereka pohon di dalam saman pemula tersebut. Walaubagaimanapun, jikapun dianggap bahawa mereka betul, iaitu, bahawa mereka tidak pada hakikatnya menuntut pemilikan atau pembayaran wang yang dijamin oleh suatu gadaian atau kedua-duanya, itu sahaja tidak akan melepaskan pemegang gadaian daripada kewajipan mereka untuk menyampaikan notis mengenai perbicaraan saman pemula yang telah ditangguhkan itu ke atas penggadai-penggadai dengan memberikan pertimbangan kepada pemakaian maxim *audi alteram partem* dan dengan itu A. 83 k. 2(4).

[5] Perluputan masa tidak merupakan penghalang kepada permohonan seseorang defendan untuk mengenepikan suatu penghakiman yang merupakan pembatalan. Selanjutnya, di bawah bidangkuasa sedia adanya untuk menghalang penyalah-gunaan prosidingnya, Mahkamah mempunyai kuasa untuk mengenepikan suatu penghakiman ingkar, sungguhpun permohonan defendan adalah di luar masa yang dihadkan, jika keadaan yang khusus itu memerlukan pencelahan Mahkamah.

[6] Tidak akan terdapat pelepasan (waiver) di dalam ketiadaan niat untuk memberi pelepasan. Penggadai-penggadai di sini merupakan orang biasa dan tidak diwakili dan secara jelasnya tidak mengetahui akan hak undang-undang mereka. Dalam keadaan ini, penerimaan wang oleh penggadai-penggadai tersebut tidak boleh ditafsirkan sebagai suatu niat untuk mengenepikan hak-hak itu. Dalam apa keadaan pun, pelepasan tidak boleh dibuat terhadap suatu perintah yang terbatal. Saman dalam kamar penggadai-penggadai tersebut, dengan itu, tidak dihalang pelepasan.

[Rayuan dibenarkan. Penghakiman Mahkamah di bawah diketepikan]

Cases referred to:
Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 ***(foll)***
Craig v. Kanseen [1043] 1 AER 108 CA ***(foll)***
United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 CLJ 577; [1988] 1 MLJ 546 ***(foll)***
R v. Chancellor of Cambridge University [1723] 1 Stra 557 ***(foll)***
Cooper v. Wandsworth Board of Works [1863] 14 CBNS 180 ***(refd)***
White v. Weston [1968] 2 AER 842 CA ***(foll)***
Marsh v. Marsh [1945] AC 271 ***(refd)***
Wiseman v. Wiseman [1953] 1 AER 601 ***(refd)***
Attwood v. Chichester [1878] 3 QBD 772 ***(foll)***
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241; [1996] 1 AMR 215 ***(foll)***
Darnley v. Proprietors etc. [1867] LR2 HL ***(foll)***

Legislation referred to:
Metropolis Management Act 1855 (UK), s. 76
National Land Code 1965, ss. 256 (2), (3), 257(1)
Rules of the High Court 1980, O. 83 r. 2(4), (1)

For the appellants - Thayalan Muniandy; M/s. Meena, Thayalan & Partners, Penang
For the respondents - Paul Chin; M/s. Gan Teik Chee & Ho, Penang

JUDGMENT

Edgar Joseph Jr. FCJ:

Preliminary

This appeal arose out of an unsuccessful chargors' application by way of summons-in-chambers to set aside an order for sale, made pursuant to s. 256(3) of the National Land Code 1965 ("the Code"), of certain charged land comprised in Temporary Certificate of Title No. H.S. (D)628786 P.T. No. 2695 (Plot No. 1723) Mukim Sungei Pasir, Daerah Kuala Muda Kedah ("the Land") and consequential orders which included an order for vacant possession, on the ground that they had not received prior notice of the date of adjourned hearing of the chargee's application to enforce the charge concerned ("the charge"), contrary to O. 83 r. 2(4) of the Rules of the High Court 1980.

The history of the matter which called for the consideration of the Court may be shortly stated.

As already noted the chargees who are the first respondents to this appeal had on 8 March 1991, pursuant to s. 256(2) of the Code commenced proceedings by way of originating summons in the High Court, holden at Penang to enforce the charge created in their favour by the chargors who are the appellants herein. The second respondent to this appeal was the purchaser at the judicial sale ("the purchaser") of the land and had been added as a party to the appeal at our behest since it was obvious that if the Chargors were to succeed, his right would be affected thereby. In the event by way of a letter addressed to this Court, the purchaser through his solicitors had taken a neutral position and was content to leave the matter to the Court but urged that in the event of the appeal succeeding he be not condemned in costs.

The chargors although duly served with the originating summons did not enter appearance, but on the date fixed for hearing - that is to say, on 30 October 1991 - they did attend Court but the case was not heard on that day. The originating summons was then refixed for hearing on 29 January 1992 and on that day, the case was heard *ex parte* and orders in terms of the originating summons including the order for sale had been made in favour of the chargees, pursuant to s. 256(3) and 257(1) of the Code ("the *ex parte* orders").

In their affidavit filed in support of their summons in chambers, the chargors who are husband and wife had claimed that they had not attended Court on the day when the case was heard and the *ex parte* orders made because they had not been served with notice of the adjourned date of hearing.

What then was the effect of the failure to serve the chargors or either of them with notice of the adjourned hearing of the originating summons on the *ex parte* orders?)

Before the Judge, Counsel for the chargors contended that the *ex parte* orders had been thereby rendered null and void as there had been a breach of the rule of natural justice expressed in the maxim *audi alteram partem* reinforced by O. 83 r. 2(4) which provides:

> 2(4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together, with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.
>
> A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph 3).

On the other hand, in the Court below, Counsel for the chargees had taken the point, that as the *ex parte* orders had been perfected before the chargors' summons in chambers to set aside had been filed the High Court was *functus officio,* having regard to the principles enunciated in *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642. Before us, though Counsel for the Chargees did not take the point he did not abandon it either.

In the alternative, Counsel for the chargees had contended that the effect of the failure to serve notice of the adjourned hearing on the chargors or either of them, was merely to render the *ex parte* orders an irregularity, which he added, in the circumstances of this case, had been cured, by waiver on the part of the chargors by reason of their having made partial repayment of the amount due to the chargees while the originating summons was still pending.

These submissions by Counsel for the chargees were all upheld by the Judge and from his judgment the chargors appealed.

At the conclusion of the arguments before us, we allowed the appeal and set aside the judgment of the Court below and entered judgment in favour of the chargors.

My reasons for doing so now follow.

Before us, the contentions of Counsel on both sides were in the main a repetition of their submissions advanced in the Court below.

The Functus Officio Point

It would be convenient**,** if I **first** took the *functus officio* point.

The rule that the Court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except in so far as is necessary, to correct errors in expressing the intention of the Court, is subject to certain **exceptions,** one of which is that an order which is a **nullity** owing to failure to comply with an essential

provision such as service of process, can be set aside by the Court which made the order in the exercise of its inherent jurisdiction. (See *Craig v. Kanseen* [1943] 1 AER 108, at 113 CA applied in *United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 1 MLJ 546). If, therefore, Counsel for the chargors were correct in his contention that the *ex parte* orders were null and void - a point to which we shall be coming shortly - then the Judge was wrong in applying the principle of *functus officio* to the circumstances of the case before him.

The Natural Justice Point: audi alteram partem

The **second point** I should like to take is the natural justice point.

Counsel for the chargors had contended that neither of his clients had been served with notice of the originating summons, when the *ex parte* orders had been made, and as a result, were absent, and that they were thereby deprived of the opportunity of being heard, contrary to the requirements of O. 83, r. 2(4).

Counsel for the chargees' answer to this point was that O. 83, r. 2(4) did not apply to the present case because the relief prayed for by the chargees in their originating summons did **not** include relief for delivery of possession or payment of moneys secured by the charge.

It was pointed out by Counsel for the chargees that it was a pre-requisite requirement of O. 83 r. 2(4), imposed by O. 83 r. 2(1), that the plaintiff must have begun a charge action by originating summons, **claiming possession or payment of moneys secured by a charge or both,** and that, the present case was not such a case. It was accordingly submitted that the failure to serve the chargors or either of them with notice of the adjourned hearing of the originating summons did not vitiate the *ex parte* orders.

In my view, even if Counsel for the chargees were correct in his description of the nature of the reliefs prayed for by the chargees in their originating summons - though, in point of fact, he was not - this would not have relieved the chargees of their duty to serve notice of the adjourned hearing of the originating summons on the chargors because, I consider, that O. 83 r. 2(4) has a common law content. In other words, in my view, O. 83, r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*. It was said by Fortescue J in *R. v. Chancellor of Cambridge University* [1723] 1 Stra 557 where Dr. Bentley had been deprived of his academic degrees by decree that the principle goes back to the Garden of Eden. This is how his Lordship put it:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. "Adam" (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also.

In *Cooper v. Wandsworth Board of Works* [1863] 14 CBNS 180, s. 76 of the Metropolis Management Act 1855 required notice to be given to the district board of an intention to build a new house, failing which they could demolish the house. The board exercised this power in relation to the plaintiff's house without giving him an opportunity to be heard. Held: An action for trespass lay against the board. Erle CJ said (at 187-189):

> The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognised, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms ... the proceedings to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer ... I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purpose of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

The **third** point I should like to take is the contention by Counsel for the chargees that, in any event, inspection of the Court file showed that there was in it a copy of a letter addressed to the chargors stating that the originating summons had been adjourned for hearing on 29 January 1992, which suggested that due notice of the adjourned date of hearing had been sent to the chargors and, on this basis, it was said that there was sufficient compliance with the requirements of O. 83 r. 2(4).

It is obvious, that "sending" a notice is a far cry from "serving" a notice, and I had, during the arguments, pointed this out to Counsel for the chargees, and he readily agreed with this proposition. Indeed, there was **no proof of posting** of this notice, and even if there had been, this even if accompanied by the fact that it was not returned, would not have sufficed as proof of service, in the absence of a deeming clause in the contract of loan or the annexure to the charge, bearing in mind especially the denial on oath by the chargors of receipt of the notice of the adjourned date of hearing.

In my view, Counsel for the chargors was correct in his contention regarding the natural justice point.

Effect of Non-Service of Notice of Adjourned Hearing

The **fourth point** I should like to take concerns the contention by Counsel for the chargees that the effect of a breach of the rule of natural justice by reason of failure to serve the chargors or either of them with notice of the adjourned hearing was merely to render the *ex parte* orders an **irregularity** which, having regard to the circumstances of this case, should be condoned.

In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the *ex parte* orders obtained, in consequence, a nullity. I am supported in this by certain authorities to which I shall now refer.

In *White v. Weston* [1968] 2 AER 842 CA Russell, LJ said this at p. 846:

> There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd.)* [1963] 1 AER 873; [1963] Ch. 502 where they were discussed. UpJohn, LJ, in that case expressly stated at pp. 882, 883; at pp. 523, 524 to be a nullity proceedings which ought to have been served, but have never come to the notice of the defendant at all, excluding, of course, cases of substituted service, by filing in default, or cases where service has properly been dispensed with. Danckwerts, LJ, adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment.
>
> ... in accordance with settled practice, the Court can exercise its discretion only in one way, namely, by granting the order sought. To quote UpJohn, LJ, in *Re Pritchard (decd.)* [1963] 1 AER at p. 881, letter D; [1963] Ch. at p. 521:
>
> In cases where a defendant has applied to set aside a judgment and is entitled to such an order as of right, the Court has exercised its discretion in respect of the defendant's costs of the application if the defendant declines to agree to terms suggested by the Court, recognising that the Court cannot impose terms on a defendant who does not agree. But here the Court, by making an order that the plaintiff's costs of the November 1966, hearing should be costs in the cause, has in effect imposed a term on the defendant, and has qualified or substracted from his absolute right to have the judgment set aside. In my view the county Court Judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger.

The case of *Marsh v. Marsh* [1945] AC 271 at 284 PC shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested

by Lord Goddard when speaking for the Board that one test which may be applied is whether the irregularity has caused a failure of natural justice. This is how his Lordship put it (at p. 284):

> A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius* 20 QBD 764 and *Smurthwaite v. Hannay* [1894] AC 494 are leading examples of the former, while *Fry v. Moore* 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v. Wiseman* [1953] 1 AER 601 Denning LJ (as he then was) criticised the above dictum of Lord Goddard, in my view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to whether the transaction has caused a failure of natural justice; see *Marsh v. Marsh*, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the Court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

This contention by Counsel for the chargees, therefore, fails.

Delay

The **fifth point** I should like to deal with concerns the contention by Counsel for the chargees that the chargors' application by way of summons in chambers to set aside the *ex parte* orders, dated 13 November 1992, had not been made within **a reasonable time** as the *ex parte* orders had been made some ten months previously, that is to say, on 29 January 1992.

In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See *Attwood v. Chichester* [1878] 3 QBD 772). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241; [1996] 1 AMR 215, at 234:

> it is clear law that the Court still retains a discretion to set aside an irregular judgment despite long delay provided it is satisfied that:

(a) no one has suffered prejudice by reason of the defendant's delay:

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment stand would constitute oppression. (See *Attwood v. Chichester* [1878] 3 QBD 772; *Harley v. Samson* [1914] 30 TLR 450.

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the Court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the Court. (See *Beale v. McGregor* [1886] 2 TLR 311).

This contention by Counsel for the chargees, therefore, fails.

The Waiver Point

The **sixth** and last point I should like to deal with concerns the contention by Counsel for the chargees that the chargors' summons in chambers to set aside the *ex parte* order was barred by waiver, in that, following the judicial sale by public auction, to the purchaser, the chargors had, in response to a letter written to them by the solicitors for the chargees, called at the latter's office and collected the balance of the proceeds of sale after deduction of the moneys payable under the charge and the usual expenses.

In my view, there can be no waiver in the absence of an intention to waive. Here, the chargors were ignorant laypersons, who were unrepresented and obviously knew nothing about their legal rights. In the words of Lord Chelmsford LC in *Earl of Darnley v. Proprietors etc.* [1867] LR2 HL 43, at p.57, "A waiver must be an intentional act with knowledge". In these circumstances, the chargors' acceptance of the money could not be construed as an intention to waive those rights. In any event, in my view, an order which is a nullity is incapable of being waived. Their summons in chambers was, thefore, **not** barred by waiver.

This contention by Counsel for the chargees, therefore, also fails.

The Result

As the Judge had failed to take into account or give proper weight, to the various matters to which I have drawn attention, his judgment could not, in justice, be allowed to stand, and so we had no alternative but to allow the appeal, with costs here and below, against the chargees **only** as the purchaser had not opposed the appeal.

The judgment of the Court below, including, of course, the order for sale, was accordingly set aside.

In consequence, the sale to the purchaser was set aside and its registration cancelled as having been obtained by an instrument, to wit, the Certificate of Sale, which was null and void within the meaning of s. 340(2)(b) of the Code. We had also ordered refund of the purchase price to the purchaser and return of the issue document of title forthwith to the chargees by the purchaser or whoever may have possession or control of the same. Finally, the proper registering authority was directed to cancel the memorials appearing in the issue document of title and the register document of title relating to the sale to the purchaser and the deposit paid into Court by way of security for costs was to be refunded to the chargors.

My brothers Dato' Mohamed Dzaiddin bin Abdullah, FCJ and Dato' Hj. Abu Mansor bin Ali, CAJ who were the other members of the Court, have perused this judgment and have asked me to say that they are in agreement with it and its reasoning.

Reported by W.A. Sharif

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